JOSEPH F. SPANIOL, JR.
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NO. 88-130

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WESTERN UNION CORPORATION,

Appellant,

v.

INDIANA DEPARTMENT OF REVENUE,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF INDIANA

MOTION TO DISMISS OR AFFIRM

LINLEY E. PEARSON
Attorney General of Indiana

TERRY G. DUGA
Deputy Attorney General
(counsel of record)

TED J. HOLADAY
Deputy Attorney General

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6288

Attorneys for Appellee

Central Publishing Company, Inc., Indianapolis, IN 46206

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The appellee, Indiana Department of Revenue, respectfully moves this Court to dismiss this appeal or affirm the judgment of the Court of Appeals of Indiana entered by that Court in Cause No. 73A01-8701-CV-1 on August 11, 1987. This motion is based upon two grounds: (1) that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument, and (2) that the question on which the decision of the cause depends has been previously determined by this Court and needs no further argument.

OPINIONS BELOW

The opinion of the Court of Appeals of Indiana is reported at 511 N.E.2d 481. A Petition For Rehearing was denied by the Court of Appeals of Indiana on September 29, 1987. The Supreme Court of Indiana denied Western Union's Petition For Transfer on April 22, 1988, and thus the Court of Appeals' opinion stands as final.

JURISDICTION

Appellant claims jurisdiction for this appeal based on 28 U.S.C. § 1257(2).

QUESTION PRESENTED BY THE APPEAL

Appellee does not accept the question as it is presented by Appellant, Western Union. The proper question presented is:

May a State, consistent with the Commerce Clause of the United States Constitution, divide certain telegraph services into intrastate and interstate segments and impose a tax upon the income derived from the intrastate parts of these telegraph services?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, provides in pertinent part that "The Congress shall have power * * * to regulate Commerce * * * among the several States * * *."

Indiana Gross Income Tax, Ind. Code 6-2.1-2-2, provides in pertinent part that:

> (a) an income tax, known as the gross income tax, is imposed upon the receipt of:
>
> * * *
>
> (2) the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana.

Indiana Gross Income Tax, Ind. Code 6-2.1-3-3 provides that:

> Gross income derived from business conducted in commerce between the state of Indiana and either another state or a foreign country is exempt from gross income tax to the extent the state of Indiana is prohibited from taxing that gross income by the United States Constitution.

STATEMENT OF THE CASE

Except for the conclusion that the exemption for interstate commerce should apply to the particular parts of Western Union's income which are in question, specifically the facility, access and equipment charges, appellee accepts Western Union's Statement of the Case at pages 4 through 7 of the Jurisdictional Statement.

REASONS FOR DISMISSING THE APPEAL OR AFFIRMING THE JUDGMENT BELOW

While the issue of interstate commerce and the protection from state taxation which Art. I, § 8, cl. 3 of the United States Constitution provides is unquestionably an issue of substance, in the context of this particular case the issue which Western Union seeks to have argued is not. This Court has stated the terms and guidelines upon which state taxation of activities within the general flow of interstate commerce will be permitted. This instance of state taxation comes within the standards for permitted taxation, and no substantial issue which requires further argument has been raised.

The requirements to sustain the tax are that it is: (1) applied to activity with a substantial nexus with the State; (2) fairly apportioned; (3) not discriminatory against interstate commerce; and (4) fairly related to the services provided by the State. *Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978); *General Motors Corp. v. Washington*, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 79

S.Ct. 357, 3 L.Ed.2d 421 (1959); see also *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977).

In this appeal, Western Union has incorrectly stated that the Indiana tax is unapportioned. Indiana has not taxed one hundred percent of the Telex and TWX income. While it is true that there was no mechanical formula used to calculate an apportionment percentage, the Indiana tax on Telex and TWX income received by Western Union from its Indiana subscribers was apportioned. As stated in the Jurisdictional Statement, page 5, the Telex and TWX charges have four separate charges billed. They are for equipment, facility, access, and usage. Western Union mentions only in passing the important fact that Indiana has conceded that ninety percent of the usage charge income is not taxable and then claims the Indiana tax is unapportioned because one hundred percent of the facility, access and equipment income from its Indiana subscribers has been taxed. Apportionment is accomplished by recognition of the income from the usage charge, which represents the charge for actually sending messages over the Western Union network, as ninety percent exempt. Indiana has limited its taxation to only the other three parts of Telex and TWX income, which are directly linked to this state. It is also significant to note that of these three, only the access charge necessarily applies to all customers. The equipment and facility charges are both only applied if certain additional items have been provided for the subscriber by Western Union.

Western Union argues that its network can not be segmented for tax purposes, but must only be considered as a whole. Its claim that any division of its network into segments for tax purposes is "artificial" is baseless. In cases such as *Dept. of Rev. v. Ass'n. of Wash. Steve.*, *supra.* and *Complete Auto v. Brady*, *supra.*, this Court has looked at only a "segment" of the interstate activity and has approved a state's taxation of that segment which occurs in that state. In the case of *General Motors v. Washington*, this Court held:

> . . . Although mere entry into a State does not take from a corporation the right to continue to do an interstate business with tax immunity, it does not follow that the corporation can channel its operations through such a maze of local connections . . . and take advantage of its gain on domesticity, and still maintain that same degree of immunity.

General Motors v. Washington, *supra*, 377 U.S. at 448.

The question of whether or not a state may tax segments of activity which occur in that state is well settled. This case raises no new issue regarding this settled point of law for this Court to revisit.

Properly limited, the Indiana income tax on the equipment, access and facility charges which Western Union receives from its Indiana customers poses no real threat of multiple taxation. Western Union has also failed to show any actual multiple taxation or discrimination against interstate commerce. Where the taxpayer fails to demonstrate multiple taxation or a definite burden on interstate commerce, this Court has refrained from passing on the question. *General Motors v. Washington*, *supra.*, *Northwestern States Portland Cement v. Minnesota*, *supra.*

CONCLUSION

For all of these reasons, the appellee respectfully prays that this Court will grant this motion to dismiss or affirm the decision below.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

TERRY G. DUGA
Deputy Attorney General

TED J. HOLADAY
Deputy Attorney General

Attorneys for Appellee